A MANUAL OF JURISPRUDENCE

FOR

FOREST OFFICERS.

CHAPTER I.

GENERAL NOTIONS REGARDING PROPERTY.

SECTION I.—OF PROPERTY AND ITS ACQUISITION.

§ 1.

IF we were to pursue the regular method of studying jurisprudence adopted in some of the old established forest schools of the Continent, we should first make a general survey of the whole system of Civil Law comprised under the great heads of the law of *Persons* and the law of *Things*.

I do not propose at present to attempt so much. I confine myself to a single topic of the general *law of Things*; but it is one which is constantly referred to in books and in conversation, and is indicated by the term "Property."

The Indian student, even if he has not reflected on the meaning of the terms, must often have heard such a phrase as—"This forest is the *property* of Government, but such and such villages or individuals have *rights in* it." Here he is introduced to a case where the "property" resides in one person, but the full enjoyment of it

is restrained by the existence of some "rights" residing in another person. Equally familiar are terms implying a *difference of kind* as regards property. We have often heard people speak of "movable" property and immovable; of land that is "ancestral" or "acquired." And I might easily, if it were necessary, multiply illustrations of the variety of ways in which we speak of "property,"—indicating by our phraseology certain peculiarities connected with the legal idea of ownership, which perhaps we do not very clearly apprehend. Therefore it is well that we should understand some, at least, of the leading ideas involved in, or connected with, the word "property."

§ 2.

At the outset I wish to deprive this term of an ambiguity which, in its popular use, attaches to it. It is used to signify both the thing owned and the right of ownership: my house is my "property" and I have a right of property in it. I shall avoid confusion by uniformly using "property" when I mean the *subject* of the right, and "ownership" when speaking of *the right* over it.

§ 3.

Property is variously classified in different systems of law. In England we have "personal" and "real" property. This is a historical distinction based on old customs, and now interwoven with our legal system, but is not one which has either philosophical precision or practical advantage. In India we have "movable" and "immovable"—a division which only partially corresponds to the English[1].

It is this division that the Indian official is chiefly concerned with. Immovable property is understood to be,—land, benefits to

[1] And we may have other classifications for special purposes. Thus, the Hindú law treats "ancestral property" (*i.e.*, property handed down in the family from ancestors) somewhat differently from "acquired property," that is, property which a man has himself made, produced or acquired.

arise out of land, things attached to the earth, or permanently fastened to things attached to the earth[2]. Movable property is, of course, all property that is not immovable[3].

Either kind of property may be a tangible object—a house, a log of wood, a field, &c.—in which case it is said to be "corporeal," or it may be a thing which has a non-physical existence only,—a right to receive rent, or to succeed to an estate, or a bond or promise to pay money; in which case it is "incorporeal."

§ 4.

In some respects this classification into movable and immovable is traditional, and has grown up by custom. But in others it is based upon real convenience. The difference is important, chiefly with reference to the manner in which either kind can be transferred and alienated. The more permanent a thing is, the more its transfer ought to be secured against mistake and fraud. The transfer of land and buildings may affect other persons besides the immediate parties, whereas the sale of a horse or a book can hardly do so[4].

[2] See General Clauses Act (Act I of 1868), section 2.

Trees as yet uncut are immovable property, even though marked for felling or girdled and killed on purpose to be cut. Fruits ungathered are also immovable. It is possible, however, to commit a "theft" of standing trees or fruits, &c., under the Penal Code, because, though the definition of theft (section 378) applies to *movable* property, yet the first explanation to the section says that this class of things (*viz.*, those attached to the earth) becomes the subject of theft the moment they are severed; and a second explanation adds that a moving which effects the severance may be a theft.

[3] The French law (Code Napoleon, A.D. 1803-4) also classifies property into movable and immovable, but admits some curious differences from our law. For instance, section 524 says that "things which an owner of the estate has placed there for the service and working of the estate are, by their destination, immovable," and hence plough cattle, agricultural implements, tools for cultivation or gardening or for the use of forest guards lodged in a (Government) forest-house, such as well ropes and buckets, &c., are all immovable property (Meaume, Introduction à l'étude de la Legislation, &c., Nancy, 1859, page 9). None of these things would be immovable by our law.

[4] We also apply different names to transactions regarding property, according as it is movable or immovable. We often call a sale of land a "conveyance;" but we should not apply this term to the sale of a cow or a watch. The term "mortgage" is not applied to goods; in such a case we speak of a "pledge" or "pawn."

In many parts of India also the sale of land in execution of decrees is hedged round with obstacles, because the land is the man's life: if he loses that, his family is broken up. I shall have to recur to this subject later, so here I at once pass on to enquire what is "property"? and what are the ideas which are involved in the term?

§ 5.

First let us notice that a thing (whether movable or immovable) does not become "property" till it "belongs to" some one, or is in some one's hands. The most splendid diamond may be lying somewhere at the bottom of the Atlantic Ocean, but you would hardly call it a piece of property. Land far away, say in the interior of Australia, is not as yet any one's "property." There must be the *acquisition* of the thing by some one or more persons (jointly perhaps) before it is "property." How then is property acquired?

§ 6.

In the present state of things by far the most ordinary method of acquisition is by some form of *transfer*. The present owner has got it by *inheritance* from his deceased relation; he has got it as a *gift*, or by *exchange*, or by a *sale*, or he has it on a *lease*, or pursuant to a *mortgage*, *i.e.*, a temporary title which is given him as security for some loan or other benefit.

§ 7.

Nevertheless there are still some methods of acquiring property which do not involve one or other of these kinds of *transfer*. For instance, I make a table or a chair, or weave a piece of cloth, and it is mine, because I made what is, in fact, a "new species," a thing different in kind as well as in value, from the mere unwrought log or skeins of thread, out of which the finished articles were made[5].

[5] I only state this generally, for there are modifications of the rule when applied to practice (Institutes of Justinian Lib. II, Tit. I, § 25). So the Indian Forest Act defines timber to *include* cart-wheels, canoes or other articles formed out of timber. A person brought up for stealing timber could not plead that the canoe or the cart-wheel, though made out of the stolen timber, was a "*nova species*" and not the timber itself, and, therefore, he could not be indicted for stealing timber.

§ 8.

Then, again, there is the principle of "accession" or "adjunction." I have a mango tree and the fruit (accessory) is mine, because the tree is, or I have a cow which bears a calf. A similar principle applies where land is gradually washed up by a river and added on to my estate.

On the principle of the owner of an estate, owning also the accessions, the English law maxim is that an owner of an estate owns everything up to the sky above and down to the centre of the earth[6]. This gives him, as part of the estate, the grass, the trees, the soil, the stone, and even the mines underneath it; and this maxim holds good generally, *i.e.*, unless a special law prescribes otherwise. This principle could not, however, be claimed as applicable to India, at any rate outside the Presidency towns; proprietary right is here dependent, not on the maxims of English common law, but on the ancient customary law of the land, and on the declarations of the local law, or the extent of right admitted or recorded at a Land Revenue settlement. The right of the Government or of private owners to mines and minerals will be discussed more fully in the Chapter on Government property which follows.

§ 9.

A case arises on this principle, which may not unfrequently come under a Forest Officer's notice—the erection of buildings of a permanent character on land. On the general principle of adjunction, the building follows the land. But this principle cannot be applied universally: the circumstances under which the building has been put up may be very different, and the rule applicable may differ accordingly.

For example, if without my permission or knowledge you build a house on my land (knowing that it is mine) the house

[6] Cooke, page 65.

becomes mine, unless, under the special circumstances, it may be equitable that I should pay you the value of the materials, or allow you to pull down the house and take the materials away.

If you build on my ground, and I stand by and do not warn or prohibit you, then I am taken to consent, and the house is consequently yours; though, by some systems of law, I should be entitled to compensation for the ground (so in the Prussian law). In India, rent would probably be allowed to the land-owner for the use of the ground in such a case.

But, supposing you were in possession of the land and believed it to be yours, though I am the real owner, and afterwards establish my right. Here the house is mine, because the land is; but you, the builder, would be entitled to recover the cost of the building, or to be allowed to pull down the house and remove the materials. I may add that in all these cases the precise facts of the case have to be considered, and in India the fact of the house being of mud ("kachá"), or of masonry ("pakká") would often affect the precise relief which a court would grant[7].

A similar case may occur in planting. As soon as trees or plants have taken root they are held, by all systems of law, to form part of the estate.

In the Prussian law, if the planter have sown or planted in good faith, and the land-owner is satisfied to keep the trees or plants,—in other words, recognizes that he has been benefited by the act, he has to pay the actual expenses of planting, and the trees become his; should he not want the trees (as if he wish to plough up the land) then he is not bound to compensate, but the owner may still take away the trees, if it is possible to do so without injury to the estate. This seems fair and equitable.

[7] There is a leading case about this in the High Court of Calcutta, reported in the Weekly Reporter, Volume VI, p. 228 (also in the Supplementary Volume to the Bengal Law Reports (Full Bench, p. 595), see also Punjab Record for 1878 Case (Civil) No. 53.

§ 10.

There may be also the case in which a thing may be acquired, because no one else wants it, or has a better right to it than the present holder.

For instance, I catch a fish in a river, or a wild animal in a waste (to which no one claims a right); when captured, it becomes mine. I may find something which has evidently been thrown away and abandoned by the owner, and I may take it if it is of use to me. I may find a piece of money or a jewel, which was evidently not intentionally thrown away or abandoned, but still it is mine, if, after using due diligence to find an owner, I fail to do so, and in fact no one with a better claim comes forward[8].

It is on this principle that "waif" rights exist on our rivers. If a log cannot be identified and is washed up or taken to the shore, it belongs to the lord of the land[9].

§ 11.—*Acquisition by Prescription.*

Lastly, it may be difficult to say how I got the land or the thing I at present own. Or, it may be that I got it originally by some method to which I can easily refer, such as sale, or under a will, but the sale or will was in itself informal or invalid: nevertheless, I have since had long, open, and peaceable, possession of the property *as my own;* and in that case the law will not allow my possession to be disturbed. I am then said to have acquired the property by *prescription.*

[8] When a man finds a *buried* treasure (*i.e.*, anything "hidden in the soil or in anything affixed thereto") exceeding in value 10 rupees, by our law, the property is called "Treasure-trove," and is subject to the provisions of Act VI of 1878. This would not apply to anything not hidden, but found on the surface. I might pick up a diamond ring in the road, and it would not be subject to this Act. On finding an article it is, however, necessary not to infringe section 403 (explanation 2) of the Indian Penal Code, by neglecting to try and find an owner. *See* also Act IX of 1872 (Contract Law), sections 168—171.

[9] I use this phrase, because, usually in India, the waif does not belong to the actual owner of the land at the spot it is found, but to the Government or Chief or Prince of the territory within which the waif is found. The principle, however is the same, whatever may be the custom of the locality.

§ 12.

And this is the principle which has to be called in *to account for the first institution of property.* It is true, as I previously observed, that property is generally acquired at *the present day* by some form of *transfer.* That is because, in our present condition, in a moderately civilized country, most things that are fit to be made property, have, for generations past, been owned by some one. But if we go far enough back, there must ultimately come a time when the property was *not* owned. Take for example a field which is your property. You got it, say, by inheritance from your father, and he from his father, and so on for generations back, till at last we come to the time when some remote ancestor simply seized the land, or something of the kind, and, having got it, he remained in possession ever since and left it to his descendants. And now the *feeling* of every one is, that after such a length of time, the possession ought not to be disturbed. The old Roman law first of all recognised this principle of *prescription,* and all other systems of law here have in one way or another followed it. The lawyers are, however, unable to explain *why* a man who has held a thing peaceably and openly as his own for a long time, should be held to have a 'title' to it, and ought not to be disturbed. It will be well if we take a brief survey of what they have to tell us on this subject. The old lawyers tell us that the thing was originally "nobody's goods" *res nullius* [10], and that the person who first took and suc-

[10] The Roman lawyers developed the idea of "*res nullius*" as usual with much clearness, and one of their developments in this respect has led to important consequences. Wild animals, precious stones or metals newly dug up, things abandoned, lands newly discovered and never before possessed,—these are all readily intelligible instances, included in their definition; but they further added to the list "*the property of an enemy.*" They held, in fact, that on the outbreak of hostilities, possession and its rights were upset, and things reverted to a "state of nature;" that the successful captors became owners as if they had landed on a new and ownerless continent. Custom in such cases regulated the question whether the individual captor or the tribe or clan at large was considered entitled to the ownership. At an early period it became the rule among the Romans that the land became the property of the State, not of the individual captor, and the State disposed of it accordingly. This curious extension of the idea of *res nullius,* has been the origin of all our modern international law regarding capture in war.

cessfully retained, possession, became owner by natural law, or got a "title by occupancy[1]."

Blackstone also reminds us that there was a time when everything in the world was "nobody's goods." The Creator, says this author, gave over the earth and its products, ready to the hand of man, and the first inhabitants of our globe simply took, land and fruits and whatever else they wanted, and kept them if they liked or could do so.

It is a celebrated aphorism, again, of the great jurist Savigny that "all property is founded on occupation ripened by prescription." In other words, that property must originate in somebody (1) *taking possession* of something, (2) in *holding* that something against all comers, till (3) his *right* to it is perfected or matured by the feeling that the lawgiver ought not to allow the possession to be disturbed.

§ 13.

But neither this nor Blackstone's statement that a "title is acquired by occupancy" really tell us anything about the origin of the institution; for it still remains to be asked—'Why or how does the fact of your taking and long holding a piece of land give you a title to it'?

All that such aphorisms can be taken to mean, is (as Sir H. Maine explains) that, however far you go back into the history of law, you can get no further than the fact that there was once a taking possession or occupation of the thing, which, being wanted, was kept exclusively by the possessor[2], and that then a sentiment

[1] Occupancy, in this sense, means the advisedly (or intentionally) taking possession of something which at the moment belongs to no one, with the view of acquiring ownership in it for yourself—(Maine's Ancient Law, Cap. VIII, p. 245). This is a special use of the term different from the popular or ordinary one, as when we speak of an "occupancy tenant" meaning merely a tenant with a right permanently to occupy his land.

[2] I can here only briefly remind the reader, that possession by tribes or clans, where the individual is more or less merged in the body is, according to the evidence of ancient history, the first form in which property is held. In ancient times, tribes were often pastoral and generally moved from place to place; they then kept

gradually grew up, and ultimately became enforced by the community as a rule, that such possession ought not to be disturbed. *We* are now so accustomed to find everything of value with an owner, that we take it, as a matter of course, that everything *ought* to have an owner; and if no one has any particular claim, then the occupant is owner, because no one else can show a better claim.

All that we can really know about the "origin of property" is that our modern ideas, which are now embodied in our laws and language, and which include—

(1) the feeling that long possession ought not to be disturbed,
(2) the feeling that everything ought to have an owner,
(3) and that ownership resides freely in each individual,

are the slow growth of ages, and have, as a matter of fact, been so evolved in the history of the human race.

How it was that people thus came to feel that *long possession ought to be respected*,—which is the first important step, and how it came to be felt that every person ought to have a separate right to his own property, are questions connected with the growth of the human mind, and the sense of right and wrong which lies deep in the mystery of the constitution of man's mental nature and social instincts.

possession for a time only. Gradually the tribes took to agriculture and built villages. Then, to avoid quarrels, the land was naturally allotted or parcelled out between the sections and ultimately the families, of the tribe. It was then the section or the family (represented by its head "the pater-familias") that was at first looked upon as the collective owner. The idea of *individual* possession, now so strong, "every man may do as he pleases with his own, &c.") is the slow growth of ages. At first it was not contemplated that the property of a family should ever be transferred at all. Such an idea was received with difficulty; the process adopted was cumbrous and often involved the fiction that the *property did not go out of* the family, but that the *buyer came into* the family! Of course, as soon as civilisation began to make the smallest progress, transfer would become a necessity. Movable property, and goods and wares of all kinds, would be the first to be exchanged and sold, and to have a formal and tedious process of solemn conveyance in such matters, would have been intolerable. Hence the restriction as to transfer gradually broke down in this direction, and that prepared the way for greater facility in the transfer of immovable property; till at last we slowly emerge into the modern idea of individual ownership and the right of unrestricted transfer.